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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

NO. 82-1194

RONALD DALE DUNN,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

NO. 82-1039

BETTY JEAN LUX DUNN,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

DOUGLAS M. BECKER*
Assistant Attorney General
Acting Chief,
Enforcement Division
BARBARA J. LIPSCOMB
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

* *Attorney of Record*

QUESTION PRESENTED

WHETHER, UNDER THE DOUBLE JEOPARDY CLAUSE, A DIRECTED VERDICT OF ACQUITTAL FOR POSSESSION OF AMPHETAMINES PRECLUDES PROSECUTION FOR THE OFFENSE OF POSSESSION OF MARIJUANA, WHERE BOTH OFFENSES WERE COMMITTED DURING THE SAME TIME PERIOD?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent in the two causes herein, by and through its attorney, the Attorney General of Texas, and in response to the petitions for writ of certiorari filed in the above causes, respectfully files this its Brief in Opposition:

OPINIONS BELOW

Copies of the notifications from the Court of Criminal Appeals denying discretionary review are included in the petition for writ of certiorari in No. 82-1039 as Appendix C, and in No. 82-1194 as Appendix B.

JURISDICTIONAL STATEMENT

Petitioner Betty Jean Lux Dunn seeks review by certiorari of the decision of the Texas Court of Appeals for the First Supreme Judicial District, sitting in Houston, affirming the trial court's denial of the requested relief. On October 20, 1982, the petition for discretionary review filed in the Texas Court of Criminal Appeals was denied. A timely filed petition for rehearing was denied by that court on October 25, 1982.

Petitioner Ronald Dale Dunn seeks review by certiorari of the decision by the Texas Court of Appeals for the Fourteenth Supreme Judicial District, sitting in Houston, affirming the trial court's denial of the requested relief. On November 17, 1982, the Texas Court of Criminal Appeals denied the petition for discretionary review.

This Court has jurisdiction of both causes pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

Article 27.05, TEX. CODE CRIM. PROC. (Vernon Supp. 1982):

> A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:
> (1) resulted in acquittal;
> (2) resulted in conviction;
> (3) was improperly terminated; or
> (4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination in consistent with the fact that must be established to secure conviction in the subsequent prosecution.

STATEMENT OF THE CASE

The facts as to each Petitioner are substantially the same. On January 27, 1979, a search warrant was executed at the home of Ronald Dale and Betty Lux Dunn. As a result of the seizure of amphetamines and marijuana, each Petitioner was indicted for offenses specifically involving the amphetamines, and for possession of marijuana. At the first trial, the state proceeded only on two paragraphs in the indictment relating to the offenses involving amphetamines. The jury was impaneled and sworn, and pleas of not guilty entered by both named defendants. Upon completion of the state's case in chief, both defendants moved for an instructed verdict of acquittal on the ground that the state had failed to meet its burden because the word "amphetamine" was misspelled in the indictment, and therefore failed to allege a violation of the Controlled Substances Act. Upon consideration by the court, the defendants' mo-

tions were granted and the instructed verdict of not guilty were entered for the defendants. Subsequently, the cases were severed. Betty Dunn was tried in August 1980 for possession of marijuana, over her objection that the prosecution was barred by the former acquittal. She was found guilty, given a ten year probated sentence and a fine of $2,500. Under the same circumstances, Ronald Dunn was tried in December of 1981, convicted, sentenced to a ten year probated sentence and fined $5,000. Though the Petitioners have filed under separate cause numbers, the issue presented in the two cases is identical.

REASONS FOR DENYING THE WRITS THE PETITIONS DO NOT PRESENT A QUESTION WORTHY OF REVIEW.

A. Petitioners' trials for possession of marijuana were not barred by the verdict of acquittal in their trial for the amphetamine offenses.

Petitioners argue that their convictions for possession of marijuana must be set aside because all the drug related offenses were part of a single criminal transaction and constitute one offense. Therefore, they argue, since they were acquitted in their first trial, the state was prohibited from prosecuting them for possession of marijuana. Respondent asserts that this interpretation of the law is erroneous.

This Court has established a firm standard for determining when consecutive sentences or successive prosecutions offend the double jeopardy clause:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two of-

> fenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932). It is clear that the *Blockburger* test states current law. Only last term in *Albernaz v. United States*, _____U.S._____, 101 S.Ct. 1137 (1981), this Court reviewed the cases since *Blockburger* which have restated and refined the standard announced there, and applied the *Blockburger* rule to a situation where petitioners had been convicted of conspiracy to import marijuana and conspiracy to distribute marijuana and received consecutive sentences.

The rule in *Blockburger* expresses the purpose of the double jeopardy clause to impose limits on judges and prosecutors. The power to define crimes and impose punishments upon those who are found guilty of them, however, resides wholly with the legislative branch. Thus, if the criminal statute meets the *Blockburger* test, and the sentences imposed for each violation are not in excess of the statutory penalties for violation, no Fifth Amendment question is presented. In this case, it is clear that, to establish a violation involving marijuana and a violation involving amphetamines, the prosecution must prove, in each case, a fact that is not necessary to the other, *i.e.*, the presence of the two drugs. Nor is one offense a lesser included offense of the other. *See, Brown v. Ohio*, 432 U.S. 161 (1977). Moreover, the language of the act tends to the conclusion that the legislature intended for each to be a separate offense. The relevant penalty provisions in the Texas Controlled Substances Act provide as follows:

> §4.032(a)
>
> Except as authorized by this Act, a person commits an offense if he knowingly or intentionally

> manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 3 or 4.
>
> §4.051(a)
>
> Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marijuana.

Article 4476-15, TEX. CIV. STAT. ANN. (Vernon Supp. 1982). In construing a similar federal statute, the Fifth Circuit found that the use of the language "a controlled substance" was intended to provide flexibility in sentencing and to allow the judge to tailor the penalty to fit the seriousness of the offenses.

> We therefore find that the purpose of the Act is to provide for multiple sentencing for simultaneous possession of different types of drugs. When Congress set penalties for possession of "a controlled substance," it intended to permit trial courts to penalize possession of "each" controlled substance.

United States v. Davis, 656 F.2d 153 (5th Cir. 1981). Thus, under any of the various tests, the criminal offenses involving amphetamines, and the offense of possession of marijuana must be construed to be two separate crimes. Therefore, prosecution for both could not have violated the Fifth Amendment, and the trial court did not err in overruling Petitioners' pleas in bar.

The *Blockburger* analysis disposes of the issue in these petitions. It is also worth noting, however, that the state apparently could have re-indicted and retried Petitioners even on the amphetamine charges. The original indictments referred to the controlled substance as *amphetimine*, clearly a clerical error. The trial judge,

therefore, on defendants' motion, directed a verdict of acquittal. As this Court has acknowledged, however, not every action by a trial judge termed an "acquittal" operates as a bar to re-prosecution. For purposes of the Fifth Amendment, further prosecution is barred only if "... the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). *See also* Petition for Writ of Certiorari, No, 82-1039, at 7a; *Thompson v. State*, 527 S.W.2d 888 (Tex.Crim.App. 1975).[1] Here, the situation is akin to a granting of defendants' motion for mistrial; in the absence of prosecutorial or judicial overreaching, defendants' motion ordinarily removes any bar to reprosecution. *United States v. Jorn*, 400 U.S. 470, 485 quoted in *United States v. Dinitz*, 424 U.S. 600 (1976).

B. The state court's alleged failure to follow state procedural rules does not raise a federal question.

Petitioners make much of what they argue was a failure of their respective trial judges to abide by Article 27.05, Texas Code of Criminal Procedure. Article 27.05, quoted in full, *supra*, sets out the various jeopardy pleas, which must be raised by the defendant prior to the trial. This statute, however, is not a statement of substantive law. It is merely a procedural statute setting out one of the steps a defendant must take to protect his rights during trial. The state has not suggested that Petitioners failed to assert their double jeopardy claims in a timely manner; therefore, the statute is not relevant here. Moreover, there is some discussion to the

1. Since the first trial did not establish any of the factual elements of the two offenses, the state was not collaterally estopped from trying any of the elements in the subsequent trials. See, *Ashe v. Swenson*, 397 U.S. 436 (1970).

effect that Article 27.05 applies only to crimes against property. See, 12 Texas Tech L. R. 393, 420-421 (1981).

Petitioners also correctly point out that, prior to 1982, a defendant in Texas could not be prosecuted and sentenced for possession of two different drugs at the same time. *Ex parte Adams*, 541 S.W.2d 440 (Tex.Crim.App. 1976). This rule arose from the Texas "carving doctrine" which was a rule of fairness imposed by the state courts to prevent prosecutors from parsing a single crime into as many crimes as possible for purposes of harassing the defendant. That doctrine was abolished in *Ex parte McWilliams*, 634 S.W.2d 815 (May 12, 1982)(on rehearing). In that case, the petitioner was convicted of the offenses of aggravated kidnapping, aggravated robbery, and aggravated rape, all committed in the same criminal episode or transaction. Both the majority and the dissenters agreed that the doctrine of carving was not based on the federal or state constitution.

> The doctrine of carving was court made; constitutions and statutes make no provisions for such a doctrine. Since we are abandoning the carving doctrine, we will now decide double jeopardy questions under the strict construction of the Constitutions of the United States and of this State.

Id. at 824. The court went on to analyze the case under the *Blockburger* rule. In any case, since the carving doctrine was apparently a creature of this jurisdiction only, the trial court's failure to follow the state caselaw cannot form a basis for invoking this Court's certiorari jurisdiction. Since Petitioners' prosecutions for possession of marijuana do not implicate the double jeopardy clause, the petitions for writ of certiorari should be denied.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the Petitions for Writs of Certiorari in Numbers 82-1039 and 82-1194 be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

DOUGLAS M. BECKER
Assistant Attorney General
Acting Chief,
Enforcement Division

BARBARA J. LIPSCOMB
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys For Respondent